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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75.

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio.

APPELLEE'S BRIEF.

HUGH S. JENKINS,
Attorney General,
AUBREY A. WENDT,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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Appellee.

APPELLEE'S BRIEF.

OPINIONS BELOW.

This case was initiated in the Board of Tax Appeals of Ohio. The opinion of the Board of Tax Appeals is contained in its journal entry which is not officially re-

ported, but is set forth in the transcript of record in this case commencing at page 65 thereof. The opinion of the Supreme Court of Ohio is reported officially in 146 O. S., 58, and unofficially in 64 N. E. (2d), 53.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

In the assessment of the Ohio franchise fee against the appellant, a foreign corporation, for the years 1935 to 1940, inclusive, the tax commissioner of Ohio used such figures as were made available to him by the appellant in its returns and otherwise. Appellant contends that the use of such figures resulted in assessments which included as Ohio business done some business which should have had an extra-state situs.

Contending, so far as is relevant to the present appeal, that such assessments resulted in "a denial of due process of law under the due process clause of the Fourteenth Amendment to the Constitution of the United States" and the laying of "an unconstitutional burden on interstate commerce in violation of the commerce clause of the Constitution of the United States,"[1] appellant appealed to the Board of Tax Appeals of Ohio and subsequently to the Supreme Court of Ohio, each of which tribunals sustained the assessments. (International Harvester Company v. Evatt, 146 O. S., 58, 64 N. E. (2d), 53.) An appeal was then filed in this court. On May 6, 1946, probable jurisdiction was noted.

[1] See appellant's assignment of errors (R., 2).

STATEMENT OF THE CASE.

A. Appellant's Limitation of the Scope of Its Appeal.

Before the Board of Tax Appeals of Ohio and the Supreme Court of Ohio the appellant challenged the validity of the franchise fees against it for the tax years 1935 to 1940, inclusive. In its appeal to this court appellant has raised no question as to the validity of the assessments for the first two years of said period and has stated on page 8 of its brief herein that "This appeal is limited to the franchise taxes for the years 1937 to 1940, inclusive."

B. Statement of Facts.

Although the facts have been set forth in considerable detail in appellant's brief, it appears appropriate again to review the facts for the purpose of pointing out some differences in our views of what the evidence disclosed and to direct the court's attention to certain matters apparently deemed inconsequential by the appellant.

The appellant in and during the years 1936 to 1939, both inclusive, was a corporation organized under the laws of New Jersey. Its principal office was located in Chicago, Illinois. It was engaged in the business of manufacturing and marketing agricultural implements, tractors, motor trucks, binder twine and similar commodities and parts thereof. During said period it operated two factories in Springfield, Ohio, and several other factories located in other states (R., 56, Stip. 1). For the purpose of marketing its products, appellant operated branch houses in thirty-five states (R., 18, 19). Each

branch had a sales organization, collection and accounting facilities and a warehouse (R., 19). Appellant also sold through dealers and retail stores, and through Canadian and foreign subsidiary sales corporations (R., 57, Stip. 3(a), (b), (c), and (d)). Sales made by such outlets were completed by deliveries either from warehouse stocks or directly from appellant's factories upon orders from branch houses or the Chicago office.

Section 5499, General Code of Ohio (Appendix C), levies an annual fee or tax on all corporations licensed to do business in the state of Ohio, both domestic and foreign, of 1/10 of 1% on a tax base or value which the tax commissioner (formerly the tax commission) is required, as provided in Section 5498, General Code of Ohio (Appendix B), to certify to the auditor of state. This fee, Section 5495, General Code of Ohio (Appendix A), provides, is, in the case of a foreign corporation, for the privilege of doing business in Ohio or owning or using a part or all of its capital or property in the state of Ohio or for holding a certificate of compliance with the laws of Ohio authorizing it to do business in Ohio during the calendar year in which such fee is payable.

Contrary to the assertions and implications found in appellant's brief, Ohio has only this one franchise fee or tax. The tax base is determined pursuant to a formula found in Section 5498, General Code of Ohio (Appendix B), wherein the value of all issued and outstanding stock of the corporation is determined and this value divided into two equal parts. One of these parts is multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used in

Ohio and whose denominator is the fair value of all its property wheresoever situated. The second part is multiplied by a fraction whose numerator is the value of the business done by the corporation in Ohio during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said preceding year wherever transacted. The sum of the figures thus obtained is the tax base or value which the tax commissioner is required to certify to the auditor of state for assessment of the fee.

The questions presented by this appeal concern only the determination of the numerator of the business fraction, that is, the value of the business done by the corporation in the state of Ohio during the preceding year. For the purpose of determining the value of Ohio business, the tax commissioner on October 13, 1939, adopted Rule No. 275 (Appendix D), which is as follows (R., 64, Stip. 16):

> "Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.
>
> All sales of goods from warehouses in Ohio wherever manufactured, shall be considered as Ohio sales.
>
> In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.
>
> The denominator of such business fraction shall in all cases be the total sales wherever made."

While the appellant was able to furnish the tax commissioner with the amounts of sales made by Ohio branches plus sales of parts direct to customers at the Springfield, Ohio, factories (R., 62, Stip. 12) and to furnish figures showing the total sales of the products of the Springfield factories (R., 89, 90, Ex. G, R. [1]) and the sales of the Springfield factories' products by Ohio branches (R., 102, Ex. G, R. [1]), it was unable to furnish the commissioner with a breakdown of such figures which would show what portion of the products of the Springfield factories was sold from warehouses outside of the state of Ohio (R., 31, 32). The best figures it was able to furnish were estimates for the fiscal year 1939 compiled from an examination of about 56,000 invoices showing that about 62% of the output of the Springfield factories was shipped to warehouses and 38% was shipped directly from Springfield to dealers and customers (R., 32, Ex. 5, R., 46, 79). Appellant's witness stated, however, that "No breakdown has been made. No breakdown can be made," respecting the number of trucks that were shipped to warehouses in Ohio and those shipped to warehouses outside of Ohio (R., 45). Furthermore, no evidence was offered to show what portion of the 62% shipped to warehouses was so shipped for the purpose of completing sales already made as distinguished from that portion shipped to warehouses in anticipation of future sales. Notwithstanding these dis-

[1] Appellee's Exhibit G was offered and admitted in evidence by the Board of Tax Appeals as shown on page 69 of the transcript of record filed with the Supreme Court of Ohio. This part of the record is included in portions of the original record which were deleted at the time of the printing of the record filed with this court.

tinct advantages to the appellant, the Board of Tax Appeals found that 62% of the output of appellant's Springfield factories was sold from warehouses outside the state of Ohio and that it should be assumed that the same percentage applied to the years 1936, 1937 and 1938 (R., 76, 77) and the value of the Ohio business done in the numerator of the business fraction was ordered reduced proportionately.

Upon review by the Supreme Court of Ohio, the tax was held to be constitutional and the order and determination of the Board of Tax Appeals was affirmed, no cross appeal having been filed by the tax commissioner.

SUMMARY OF ARGUMENT.

There Was No Denial Of Due Process.

The questioned Ohio fee is levied against every corporation for the privilege of doing or having the right to do business in Ohio. Two factors are considered in the determination of the franchise fee. First, there is considered the property owned and used in Ohio as compared with the corporation's entire property. Second, there is considered the business done in Ohio as compared with the corporation's entire business wherever transacted. Appellant questions only the value of the Ohio business done. Ohio business done is measured by the value of all sales wherever transacted of goods either warehoused or manufactured in Ohio, except sales of goods sold from warehouses outside of Ohio. Appellant contends that Ohio business done should be determined by a different formula and that the formula which is used by Ohio results in the taxation of extra-state busi-

ness in violation of the due process clause of the Fourteenth Amendment. The cases relied upon by the appellant deal with taxes on sales, gross receipts, gross income and the like. State statutes attempting to tax sales, transactions, income or receipts made or arising in other jurisdictions have been consistently stricken down as being in violation of the Constitution. Such decisions, however, are not controlling in the present situation, for Ohio has not attempted to tax property, income, receipts or sales. It has taxed only the right or privilege of the appellant to do business in Ohio for current years measured by the business done during the preceding years. This court has repeatedly held that the due process clause is not violated by a statute taxing the right to exercise corporate privileges in a state where the amount of the tax is measured by the amount of sales of locally manufactured goods, whether sold within or without such state, so long as the apportionment designated is reasonably fair and applies to all corporations alike. The Ohio act meets all the requirements of the due process clause and should therefore be sustained.

There Is No Violation Of The Commerce Clause.

The Ohio franchise fee is a tax upon domestic and foreign corporations for the privilege of doing or holding a license to do domestic business in the state of Ohio. Such a tax is valid even if interstate transactions are used in part in the determination of the tax. There is no direct and immediate burden on interstate commerce, no attempt to tax sales or receipts therefrom and no at-

tempt to make the legality of sales or transactions in any way dependent upon payment of the tax. Sales, both local and interstate, are only indirectly affected in the same manner as they are affected by any other tax upon a corporation, such as a tax upon its property.

The use of such sales as are completed by deliveries of goods from Ohio factories and warehouses, as a measurement of the tax, meets all the requirements of the commerce clause. There could be no double taxation, as appellant contends, for if other states have similar taxes each sale could be claimed by only one state, to wit, that state from whence the goods were shipped. The fact that other states may have gross receipts taxes, sales taxes and the like, as shown in the cases relied upon by the appellant, is of no consequence, for the Ohio tax is only for the privilege of doing business, measured in part by local and in part by some interstate business. The Ohio tax effects a reasonable allocation of business to Ohio which is all that is required of franchise taxes by the commerce clause. Since the Ohio tax does not regulate nor burden either local or interstate commerce, appellant's second assignment of error is not sustained.

ARGUMENT.

The Ohio Franchise Fee Being A Privilege Tax Upon the Right To Exercise Corporate Powers Within the State for the Current Year, Measured by Sales of Ohio Goods During the Preceding Year, Meets All the Requirements of the Due Process Clause of the Fourteenth Amendment.

During the entire period involved herein, Ohio has had a franchise fee or tax which is levied without discrimination upon both domestic and foreign corporations. The purpose of the tax is stated in Section 5495, General Code of Ohio (Appendix A). The nature of the tax is further disclosed in the first three branches of the syllabus in the case of **Aluminum Company v. Evatt**, 140 O. S., 385, 45 N. E. (2d), 118, wherein it was held:

> "1. The franchise tax levied pursuant to Sections 5498 and 5499, General Code, on a foreign corporation is for the privilege of doing business in this state or owning a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state. (Section 5495, General Code.)
>
> 2. 'Doing business' in this state is only a part of the privilege taxed under Section 5495, General Code. The tax also covers the privilege of owning a part or all of the foreign corporation's capital or property in this state as well as the privilege of holding a certificate of compliance with the laws of this state.
>
> 3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales."

The method by which the tax is computed is well summarized by the Supreme Court of Ohio in its decision from which this appeal has been taken, **International Harvester Company v. Evatt**, 146 O. S., 58, 64 N. E. (2d), 53, in the first branch of the syllabus which is as follows:

"1. For the privileges set forth in Section 5495, General Code, the state charges a fee against all corporations doing business in Ohio on the value or proportionate value of the issued and outstanding shares of stock of each such corporation. (Section 5499, General Code.) The amount of this fee is based on the proportion of its property held or used in Ohio and of business done in Ohio by a corporation (domestic or foreign) during the preceding year. This fee is computed under Section 5498, General Code, by first determining the value of the issued and outstanding shares of stock of the corporation. Thereafter a base is determined by dividing the value of the issued and outstanding shares into two equal parts. One part is then multiplied by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wherever situated. The other part is multiplied by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year, wherever transacted. The tax commissioner then certifies to the auditor of state the base determined by him through adding the two figures thus obtained. The auditor makes a charge of one-tenth of one per cent upon the base so certified and in turn certifies the amount of the fee to the treasurer of state. The treasurer then mails to the corporation a statement showing the value or the proportionate value of the shares of

stock upon which such fee is charged and the amount of the fee. (Section 5499, General Code.)"

From the foregoing, it is seen that Ohio has a privilege tax that is measured in part by that portion of its entire business as is done in the state of Ohio. No statutory formula is set forth for the determination of business done, but by the adoption of a rule (Rule No. 275, Appendix D) which followed years of administrative practice, as disclosed by Opinions of the Attorney General of Ohio[1], Ohio business done has been measured by the value of sales of goods supplied from Ohio warehouses and factories regardless of whether such sales are made in Ohio or elsewhere. But such portion of the output of an Ohio factory as has been warehoused outside of Ohio awaiting sale is not included in Ohio business. Neither are sales made in Ohio if the products sold are shipped in furtherance of such sales from out of the state factories and warehouses. Thus, it is seen that a reasonably accurate formula for apportionment has been adopted.

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[1] In 1915 the then attorney general of Ohio held as shown in the Opinions of the Attorney General for 1915, at page 460:

"The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes 'doing business' in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable and lawful under Section 5502 to measure the volume of such business by sales of manufactured articles, whether such sales otherwise represent interstate commerce or not."

In 1937 the then attorney general of Ohio held as shown in the Opinions of the Attorney General for 1937, at page 220:

"Sales made of products manufactured in Ohio, from the company's factories located in this state to customers within and outside of Ohio are to be considered Ohio business, for the purpose of determining the franchise tax to be assessed under the laws of this state."

In **Illinois Central R. Co. v. Minnesota**, 309 U. S., 157, 161, it was said that mathematical exactitude in the apportionment is not a constitutional requirement. "Rough approximation rather than precision is, as a practical matter, the norm in any such tax system." See also **Dane v. Jackson**, 256 U. S., 589, 599.

Appellant contends that Rule No. 275 violates the due process clause of the Fourteenth Amendment for the reason that sales made in other states are included as Ohio sales if the goods are shipped from either an Ohio warehouse or an Ohio factory. In other words, it is contended that Ohio should not use the point of shipment as the test for allocation. It is urged that instead there should be substituted as the test the place where the sale was consummated. As authority for this contention, appellant relies upon one of its former cases before this court, **International Harvester Company v. Department of Treasury**, 322 U. S., 340, and in particular the holding on what was described therein as "Class E sales." These were sales "by an Indiana seller to an Indiana buyer where the goods were shipped from points outside the state to the buyer." (p. 346.) The tax there in question was a privilege tax upon the receipt of gross income. It was the same tax considered in **J. D. Adams Manufacturing Co. v. Storen**, 304 U. S., 307, also relied upon by the appellant. The distinction between these cases and the instant case is plainly pointed out in the Adams Manufacturing Company opinion by Mr. Justice Roberts (p. 310), where, referring to the Indiana gross income tax, it was said:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross in-

come of non-residents from sources within the state. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales such as the state would be competent to demand from domestic or foreign corporations for the privilege conferred."

The Ohio tax is not a tax upon the transfer of property nor is it a tax upon the consummation of transactions measured by the gross receipts from sales. Quite to the contrary, it has been definitely held to be a franchise tax, an excise tax laid on the privilege of doing business in Ohio for the current year measured by the value of the Ohio business done in proportion to the entire business during the preceding year. Business done in turn is allocated to the point from which the goods sold were taken from stock, whether it be a warehouse or factory. See **Aluminum Company v. Evatt**, 140 O. S., 385, 45 N. E. (2d), 118; and **International Harvester Company v. Evatt**, 146 O. S., 58, 64 N. E. (2d), 53.

In the Aluminum Company case, it was further held in the third branch of the syllabus that:

"3. The Ohio Franchise Tax (Section 5495 et seq., General Code) is not a tax upon commerce, state or interstate. It is not a tax upon income, receipts or sales."

In the International Harvester Company opinion (R., 119), it was said:

"As pointed out above, the instant case does not involve a tax on sales or income but is solely a fee charged upon the value or proportionate value of the shares of stock of a corporation for the privilege

of doing business in Ohio and of owning a part or all of its capital in this state or for a holding of the certificate of compliance of this state authorizing it to do business in this state and is computed in part on business done in a year preceding the year for which the fee is assessed. In the Aluminum Co. of America case, supra, which we approve and follow here, and in the instant case, we relied upon and now rely upon, inter alia, American Mfg. Co. v. City of St. Louis, 250 U. S., 459, 63 L. Ed., 1084, 39 S. Ct., 522; Hump Hairpin Mfg. Co. v. Emerson, Secy. of State, 258 U. S., 290, 66 L. Ed., 622, 42 S. Ct., 305; International Shoe Co. v. Shartel, Atty. Genl., 279 U. S., 429, 73 L. Ed., 781, 49 S. Ct., 380; and Hope Natural Gas Co. v. Hall, Tax Commr., 274 U. S., 284, 71 L. Ed., 1049, 47 S. Ct., 639."

Appellant also relies upon the case of **Hans Rees' Sons, Inc., v. North Carolina**, 283 U. S., 123. Concerning the inapplicability of this case, it was said in the opinion in **Aluminum Company v. Evatt**, 140 O. S., 385, at page 401:

"The Hans Rees' Sons case involved a North Carolina statute imposing an income tax. As the state attempted to allocate from 66 to 85 per cent of the corporation's income to North Carolina, whereas the evidence showed that only 17 per cent of the corporation's income was earned in North Carolina, the court held, not that the interstate commerce clause was violated, but that as the income tax was applied by the state authorities the result was so arbitrary and unreasonable as to be beyond the state's power.

Bearing in mind that the court was there dealing with an income tax law, note the following language used by Mr. Chief Justice Hughes at page 133:

'But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean

that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as "component parts of a single unit" so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state.'

No question of income, gross or net, is involved in the instant case. No attempt is made to tax any part of appellant's income, either within or without this state. Neither is appellant's income, gross or net, used as any part of the measure of the tax. Instead of an income tax law, we are dealing in the instant case with a franchise tax imposed 'for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.'

The privilege is not confined merely to 'doing business.' It is a tax on purely local activities, and like the ordinance in American Mfg. Co., supra, it is measured by the business done in Ohio, to wit, the manufacturing."

Appellant assumes that the Ohio formula allocated an excessive value to this state. That is an unwarranted assumption. Surely Ohio has a right to consider goods manufactured and warehoused within its borders as a measuring stick. But Ohio has not gone that far. It has excluded from the computation all Ohio manufactured goods that are shipped to warehouses in other states. It has also excluded all Ohio sales where the goods sold are shipped into Ohio from other states. If appellant did not receive full credit for sales of this type, it has only itself to blame for failing to furnish the required information to the tax commissioner (R., 31, 32, 45). The

Board of Tax Appeals accepted an estimate made by the appellant for 1939 and projected it into the earlier years on the unsupported assumption that conditions were approximately the same, whereby 62% of the output of appellant's Springfield factories was excluded from the numerator of the business done fraction. Such credits resulted in distinct advantages to the appellant, for some of the warehouses which received the 62% of the output of appellant's Ohio factories were Ohio warehouses and to this extent should not have been excluded (R., 45). Furthermore, some of such shipments from the Ohio factories to branch warehouses were in all probability made for the purpose of fulfilling orders already accepted, which, under the tax commissioner's rule, should have been included in the Ohio business done. The term "sales from warehouses," as used in the rule, refers only to sales of goods stocked in the warehouses; goods that have come to rest therein. From the foregoing, it appears that due to the deficiency in information furnished the tax commissioner by the appellant, and due to the lack of evidence furnished the Board of Tax Appeals, it is possible that appellant may have received a benefit not enjoyed by other similar Ohio taxpayers when the Board of Tax Appeals made it an allowance of a speculative 62% credit. Under a somewhat similar set of facts in the case of **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, Mr. Chief Justice Clarke said on page 293:

> "If the secretary of state or the court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason, in a proper case, for correcting the

computation, but would not justify declaring the act unconstitutional."

Appellant, condemning what is described as "an arbitrary allocation formula," cites and relies upon **Cudahy Packing Company v. Hinkle**, 278 U. S., 460; **Looney v. Crane Company**, 245 U. S., 178; and **Air-Way Electric Appliance Corporation v. Day**, 266 U. S., 71. As we have demonstrated, this assertion of arbitrary allocation is unwarranted. A reasonable apportionment has been made by the statutes as interpreted. The cases cited by the appellant are here distinguishable in the same manner as was pointed out by Mr. Justice Stone in the case of **International Shoe Company v. Shartel**, 279 U. S., 429, wherein he said beginning at page 433, "The tax is distinguishable from those considered in **Air-Way Electric Appliance Corporation v. Day**, 266 U. S., 71, **Looney v. Crane Co.**, 245 U. S., 178, and **Cudahy Packing Co. v. Hinkle**, 278 U. S., 460, which either were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state."

The power of a state to levy an excise tax upon a foreign corporation for the privilege of doing business within its borders has been repeatedly recognized by this court. **National Leather Company v. Massachusetts**, 277 U. S., 413, 423; **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, 293; **American Manufacturing Company v. St. Louis**, 250 U. S., 459, 463; and **Maxwell v. Bugbee**, 250 U. S., 525, 539. The taxing statute will not be considered as violative of the due process

clause of the Fourteenth Amendment unless it is patently arbitrary or grossly unequal, making it in effect a means of confiscation of property rather than a tax. **A. Magnano Company v. Hamilton**, 292 U. S., 40, 44; **Dane v. Jackson**, 256 U. S., 589, 599; **Maxwell v. Bugbee**, 250 U. S., 525, 539, 540; **Mount St. Mary's Cemetery Association v. Mullins**, 248 U. S., 501, 505. The due process clause of the Fourteenth Amendment is not violated unless the apportionment is clearly arbitrary and unreasonable. **Hans Rees' Sons, Inc., v. North Carolina**, 283 U. S., 123; and **Maxwell v. Bugbee**, 250 U. S., 525, 539.

Where a state acting within its authority levies a privilege tax, it may use as a measure of such tax, property or transactions which are in themselves within the jurisdiction of a state for purposes of taxation. **Great Atlantic & Pacific Tea Company v. Grosjean**, 301 U. S., 412, 424; **Maxwell v. Bugbee**, 250 U. S., 525, 539; **American Manufacturing Company v. St. Louis**, 250 U. S., 459; and **International Shoe Company v. Shartel**, 279 U. S., 429, 433.

From the foregoing, it seems inescapable that there is no violation of the due process clause. Ohio has sought to tax only those privileges which the appellant has enjoyed within her borders. Such a tax may be measured in part at least by transactions or sales that were consummated in other states where the goods sold were delivered from Ohio stocks. **American Manufacturing Company v. St. Louis**, 250 U. S., 459.

The Ohio Franchise Fee Being A Privilege Tax Upon the Right To Exercise Corporate Powers Within the State for the Current Year, Measured by Sales of Ohio Goods During the Preceding Year, Does Not Violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

Under our argument showing that the Ohio franchise fee does not violate the due process clause, we have described the nature of the tax. We refer back to such description rather than prolong this brief with repetition.

The commerce clause does not prevent a state from levying a franchise or privilege tax upon a foreign corporation for the privilege of doing business within the state even though the corporation is engaged in interstate as well as intrastate commerce. **International Shoe Company v. Shartel**, 279 U. S., 429, 433; **Schwab v. Richardson**, 263 U. S., 88, 92; **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, 294. Such a tax is valid even if interstate transactions are used in its computation, if interstate commerce is not directly and immediately affected thereby and if interstate commerce is not unduly regulated, burdened or restrained by the tax. **International Harvester Company v. Department of Treasury**, 322 U. S., 340; **Southern Natural Gas Corporation v. Alabama**, 301 U. S., 148, 156; **Atlantic Lumber Company v. Commissioner**, 298 U. S., 553; **Western Cartridge Company v. Emmerson**, 281 U. S., 511; **Schwab v. Richardson**, 263 U. S., 88; **Hump Hairpin Manfacturing Company v. Emmerson**, 258 U. S., 290; **Underwood Type-**

writer Company v. Chamberlain, 254 U. S., 113, 119; and **American Manufacturing Company v. St. Louis**, 250 U. S., 459. The Ohio franchise fee meets these tests. It is a tax on the right to conduct intrastate business by domestic and foreign corporations. In the case of corporations doing both intrastate and interstate business, such as the appellant, the Ohio statutes reasonably apportion the business done. That some of the sales considered in arriving at the measurement of the Ohio business done are interstate sales is of no consequence, for the value of such sales and intrastate sales are used together only as one of the elements in the process of determining the assessment. The use of interstate sales under the Ohio statutes only indirectly affects interstate commerce and is not a burden thereon nor an attempt at regulation. The tax applies alike to both domestic and foreign corporations whether they do solely intrastate business or are engaged in both intrastate and interstate transactions. In **Gwin, White & Prince v. Henneford**, 305 U. S., 434, Mr. Justice Stone said (p. 438):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens, Postal Telegraph Cable Co. v. Richmond, 249 U. S., 252, 259, and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden."

Appellant contends that **Hump Hairpin Manufacturing Company v. Emmerson**, 258 U. S., 290, and **Western Cartridge Company v. Emmerson**, 281 U. S., 511, should be distinguished from the present appeal. The distinctions attempted, however, have no legal significance. In

the Hump Hairpin Company case, this court found (p. 294) that although the corporation's activities reduced the interstate element in its business to the lowest terms, interstate business was being done and the question remained whether the use made by the amount of such interstate business in determining the amount of the tax, rendered it invalid. It was concluded as "settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights." On page 295 the Illinois tax, which is remarkably similar to the Ohio tax, is analyzed and found to meet all the constitutional requirements.

In the Western Cartridge case, it is said (p. 514) that the fee does not depend upon the amount of interstate transactions and that "The exaction may arise while the sales to customers outside Illinois decline and may fall while such sales increase." Appellant contends that such a situation could not obtain in Ohio. To us it seems plain that the amount of property owned and used in Ohio might increase or decrease without any relation to the amount of interstate commerce done. So too the franchise fee might increase or decrease, depending upon the number of sales filled from Ohio warehouses and factories without any regard to the amount of interstate commerce. For example, the entire output of the Ohio factories might have been first warehoused in another state and all Ohio sales filled from outside warehouses and factories, in which case Ohio would get nothing by reason of the business done fraction.

Appellant further states in its brief (pp. 26, 27) "But the vital and compelling reason why the inclusion of the 38% of sales as Ohio business results in laying a prohibited multiple burden on interstate commerce is that the very same sales are directly taxed or are used as the measure of a tax in many states where the appellant has its branch houses." It must be remembered that Ohio is not attempting to collect a sales tax from the appellant. Ohio is not attempting to tax or in any wise regulate the sales or transactions of the appellant. Ohio only seeks to tax the appellant for the privilege of having done business locally and to use as the measure of this tax the total sales, wherever made, of goods sold directly from Ohio warehouses and factories. As stated by the Ohio Supreme Court, double taxation could not exist. If the same rule were to be applied by each state in which the appellant did business, exactly 100% of appellant's total sales—no more and no less—would be used in computing business done in the several states. Each sale would have to be filled from some warehouse or factory and the state in which such warehouse or factory would be located would be the only state to use such sale as an element in its assessment. Appellant urges that **International Harvester Company v. Department of Treasury**, 322 U. S., 340, is authority to the contrary. But, as we have stated in our previous discussion of due process, the International Harvester Company case was concerned with a gross receipts tax. A gross receipts tax is available only to tax receipts that arise from local business. Ohio could not levy a sales or gross receipts tax on appellant's sales in other states for it furnishes no

protection to such sales. But it may properly tax appellant's right to do local business and measure such tax, in part at least, by interstate sales.

Appellant states that **American Manufacturing Company v. St. Louis**, 250 U. S., 459, is not authority for the support of the Ohio tax because the St. Louis tax was levied for the privilege of manufacturing (appellant's brief, p. 29) "whether done by a person, partnership, association or corporation," while "The Ohio tax is laid only on corporations and solely because they are corporations." Since the only errors assigned by the appellant involve the due process and commerce clauses of the Constitution, it seems out of place herein to debate classification of taxpayers. This leaves only the question of whether there is a legal distinction between a tax based upon the privilege of conducting a manufacturing business and one on the permitting of the conduct of any corporate business. The latter, which is the Ohio tax, includes the former and is governed by the same legal principles. It is suggested that only the city of St. Louis could impose the manufacturing tax. By the same token, only Ohio could impose a franchise tax on appellant for the privilege of doing business in Ohio measured by sales of goods from Ohio warehouses and factories. Second, it is said that every state in which appellant does business could impose a tax, similar to the Ohio tax, on the appellant. That is a correct statement. But appellant would not be harmed, for it would find no single transaction would be included in the computation of the assessment in more than one state, to wit, the state from which the goods were shipped to fill the order.

We think the Supreme Court of Ohio correctly followed **American Manufacturing Company v. St. Louis**, 250 U. S., 459. The operation and effect of the Ohio law is to use as the measure of the tax, so far as we are concerned in this appeal, the total value of such sales as were made by the appellant of goods having an Ohio situs, irrespective of whether they were sold within or without the state of Ohio or in intrastate or interstate commerce. Payment of the tax is not made a condition of selling goods in either kind of commerce, but only of continuing to hold a license to do business in the state of Ohio. Like the St. Louis tax, the Ohio franchise fee produces no direct burden on commerce, domestic or interstate. It has only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other contribution to the cost of government. Therefore, like the St. Louis tax, it does not amount to a burden or regulation of interstate commerce.

CONCLUSION.

From the foregoing and numerous other cases touching the question of due process under the Fourteenth Amendment and the commerce clause of Article I, Section 8, Clause 3, it appears that the Ohio franchise fee was correctly assessed against the appellant for the tax years 1937, 1938, 1939 and 1940 by the tax commissioner of Ohio as modified by the Board of Tax Appeals of Ohio and affirmed by the Supreme Court of Ohio. Appellant's complaint appears to have been inspired by a failure to distinguish between sales and gross receipts tax decisions and decisions on franchise taxes levied on corporations for the purpose of authorizing the doing of local business but measured by elements or transactions that could not themselves be taxed by the taxing state. We believe the Supreme Court of Ohio has correctly followed the distinctions carefully made by this court and its decisions should be affirmed.

Respectfully submitted,

HUGH S. JENKINS,
Attorney General,
AUBREY A. WENDT,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

APPENDIX A.

Section 5495, General Code of Ohio.

The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

APPENDIX B.

Section 5498, General Code of Ohio.

After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding

shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in Section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other

part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of Section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation.

APPENDIX C.

Section 5499, General Code of Ohio.

On or before June 15 the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent upon such value so certified, and shall immediately certify the same to the treasurer of state, provided, however, that no fee shall be charged from any corporation which shall have been adjudicated a bankrupt, or for which a receiver shall have been appointed or which shall have made a general assignment for the benefit of creditors, except for the portion of the then current year during which the tax commission shall find such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act. But in no case shall the fee be less than twenty-five dollars.

Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each corporation at its principal office in the state of Ohio, or to such person in the state of Ohio as the corporation may designate in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as is provided in Section 5491 of the General Code. But no penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state.

APPENDIX D.

Rule No. 275, Adopted October 13, 1939, By the Tax Commissioner of the State of Ohio.

Rule No. 275. Business done in and out of Ohio.—Business done in and out of Ohio by a corporation subject to the payment of franchise taxes shall be determined under Section 5498, General Code, by allocating to the business fraction therein provided sales in and out of Ohio.

All sales of goods from warehouses in Ohio, wherever manufactured, shall be considered as Ohio sales.

In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state.

The denominator of such business fraction shall in all cases be the total sales wherever made.